IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Case No. CR-00-S-422-S
	)	
ERIC ROBERT RUDOLPH,	)	
	)	
Defendant.	)	

ORDER

On May 14, 2004, defendant filed his Motion for Preservation and *In Camera* Production and/or Discovery of Rough Interview Notes (Doc. 221), in which he seeks not only an order directing Government agents to preserve their rough notes of interviews with witnesses, but also directing that the notes be submitted to the court for *in camera* inspection or turned over to the defense. His original motion advanced two arguments supporting the need for *in camera* review: first, that the rough notes may contain exculpatory or impeaching Brady/Giglio material the Government is obligated to produce and, second, that some portion of the notes constitute Jencks material. In a reply brief filed July 2, 2004, however, defendant seems to abandon the argument that Jencks requires production or *in camera* inspection. Rather now, in addition to the Brady/Giglio argument, he contends that the agents' rough notes are discoverable under Rule 16(a)(1)(E)(i) of the *Federal Rules of Criminal Procedure*, as they are "material" to the preparation of the defense. Although the court agrees that the Government should be required to preserve all notes now existing, neither of these arguments warrants wholesale *in camera* review or production to the defense of rough notes of literally tens of thousands of witness interviews.

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It is important to understand the precise nature of the defendant's request. Already produced to him have been *hundreds* of *thousands* of pages of FBI-302s[1] and other investigative records and memoranda. What he seeks now are not these records, but the investigative agents' rough notes, taken during interviews of thousands of witnesses and later used to generate the documents that have been produced to him. For example, when an investigating agent interviews a witness, he may make rough, hand-written notes of the interview from which the agent will later prepare an FBI-302 or similar record memorializing the substance (but not necessarily the exact words) of the witness's statement. The memorializing records have been produced to the defendant; he now wants the underlying rough notes, ostensibly to compare them to the documented version of the interview for inconsistencies or incompleteness. Short of simply producing these rough notes to the defense, he asks that the court undertake an *in camera* review, comparing literally hundreds of thousands of rough notes to the FBI-302s and other records generated from them.

The defendant's reliance on F.R.Crim.P. 16(a)(1)(E)(i) as a basis for seeking rough notes is unpersuasive. Contending that rough notes of witness interviews is discoverable simply overlooks Rule 16(a)(2), which limits the discoverability of even material and helpful information in the Government's possession. That rule states plainly:

> Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

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[1] FBI-302s are the forms used by FBI agents to summarize, record, and memorialize investigative interviews with potential witnesses.

An agent's rough notes of a witness interview are either a "statement" made by a prospective government witness or a "report[], memorand[um], or other internal government document[]" made by "a government agent in connection with investigating... the case." Under either category, they are exempt from production. As the court of appeals recently pointed out, Rule 16(a)(2) is a "limitation" on the discovery provided by Rule 16(a)(1)(E). United States v. Jordan, 316 F.3d 1215, 1251 (11th Cir. 2003)("The discovery afforded by Rule 16(a)(1)(C) is *limited* by Rules 16(a)(2) and (3).")[2] [italics added].[3] Therefore, even though witness statements and agent memoranda are undoubtedly "material" to the defense in the sense that having them would be "helpful," they remain exempt from discovery by operation of Rule 16(a)(2). See also United Kingdom v. United States, 238 F.3d 1312 (11th Cir. 2001). Rule 16(a)(1)(E)(i) simply does not override Rule 16(a)(2)'s limitation on the discovery of rough notes of witness interviews.

Notwithstanding Rule 16(a)(2), however, the obligation to produce Brady/Giglio materials still falls on the Government; it is the prosecutors' duty to identify material exculpatory and impeaching information and to make it available to the defendant. United States v. Jordan, 316 F.3d 1215, 1251 (11th Cir. 2003). To obtain discovery of the rough notes as Brady/Giglio material, the

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[2] The reference to Rule 16(a)(1)(C) involved the format of the rule prior to the 2002 reorganization of the Rules. The current version of former Rule 16(a)(1)(C) is now Rule 16(a)(1)(E). Thus, Jordan still stands for the proposition that discovery under Rule 16(a)(1)(*E*) is limited by Rules 16(a)(2) and (3).

[3] Indeed, in Jordan the Eleventh Circuit observed that Rule 16(a)(2) precludes discovery even of the FBI-302s, or "witness summaries." "Under Rule 16(a)(2), therefore, the interview summaries made by the government agents were exempt from discovery." Id. at 1227, note 17. Certainly, if the prepared summary of a witness interview is shielded from discovery, the underlying notes of the interview are also.

defendant must meet the standards required by Brady/Giglio. Again, in Jordan the court of appeals explained:

> In addition to the government's discovery obligations under Rule 16(a), the government must also honor the defendant's constitutional rights, particularly the due process right Brady v. Maryland established. [Footnote omitted]. Brady requires the prosecutor to turn over to the defense evidence that is favorable to the accused, even though it is not subject to discovery under Rule 16(a), since, eventually, such evidence may "undermine[] the confidence in the outcome of the trial." United States v. Newton, 44 F.3d 913, 918 (11th Cir. 1995) (quoting United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481 (1985)). The defendant's right to the disclosure of favorable evidence, however, does not "create a broad, constitutionally required right of discovery." Bagley, 473 U.S. at 675 n. 7, 105 S. Ct. at 3380 n. 7. [Footnote omitted]. Indeed, a "defendant's right to discover exculpatory evidence does not include the unsupervised right to search through the [government's] files," Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40 (1987), nor does the right require the prosecution to deliver its entire file to the defense. See Agurs, 427 U.S. at 109, 96 S.Ct. at 2400. Rather, Brady obligates the government to disclose only favorable evidence that is "material." The "touchstone of materiality is a 'reasonable probability' of a different result." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995). Accordingly, under Brady, the government need only disclose during pretrial discovery (or later, at the trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings.

United States v. Jordan, 316 F.3d 1215, 1256-1257 (11th Cir. 2003).

Here the defendant has pointed to no specific information or issue suggesting that the court must supervise and enforce the Government's compliance with its Brady/Giglio duty; rather defendant simply asks the court to review hundreds of thousands of pages of rough notes of witness interviews to assure that the Government has met its obligation. Given that the Government has produced the FBI-302s and other investigative memoranda, the "materiality" of the rough notes could lie only in the possibility that the rough notes contained something different from what is reflected in the FBI-302s and other documents generated from them. In other words, the defendant

must show that the rough notes contain some exculpatory or impeaching information *not* revealed by the FBI-302s and other produced records. If the rough notes are consistent with the FBI-302s and other records already produced, then everything helpful has been produced and nothing has been suppressed. Absent some showing, or at least a colorable suggestion, that there exists such exculpatory or impeaching information in the rough notes but not in the documents already produced, the Government has complied with its acknowledged Brady/Giglio duty, and the court would have no reason to undertake such a massive and apparently unnecessary task.

The parties are fully aware of the consequences a failure to produce "material" Brady/Giglio information may have. The court's undertaking of such a massive review would have the deleterious effect of relieving the prosecutors of their duty to do so, and of relieving them of the consequences of a failure to do so. If the Government produced all rough notes for *in camera* review, it could not be said then that the Government suppressed any exculpatory or impeaching information. Yet, the court's review of the documents would not assure that everything that might be materially helpful to the defense would be made available to the defense, as the court also might not appreciate or realize the materiality of any particular needle of information in a haystack of documents. The prosecutors have a greater interest in assuring faithful compliance with Brady/Giglio, and to the extent they are unsure of the significance of any particular information they possess, they remain free to submit that particular information to the court for *in camera* review. See Jordan, *supra*.

In his reply brief of July 2, 2004, the defendant attempts to show the possibility that the rough notes contain exculpatory or impeaching information *not* already revealed in the FBI-302s and other records that have been produced. He points to inconsistencies between statements taken from witnesses at different times, and suggests that the rough notes might contain even more

inconsistencies. Insofar as the FBI-302s reveal the inconsistencies on which the defense predicates its argument, the inconsistencies are *known* to the defense and can be exploited. It is nothing more than speculation to assert that the rough notes, from which the produced records were generated, would reveal additional inconsistencies beyond those already revealed.

Accordingly, to the extent the defendant's motion seeks an order directing the Government to take steps to *preserve* all rough notes, it is due to be and hereby is GRANTED, and the Government is DIRECTED to preserve all existing rough notes of witness interviews. Insofar as the motion seeks to compel production of the notes as discovery or to compel their submission for *in camera* review, the motion is DENIED.

The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record.

DONE this the 9th day of July, 2004.

T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE JUDGE